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In the Supreme Court of the United States

OCTOBER TERM, 1975

ROBERT WEINSTEIN, ET AL.,
Petitioners

v.

HOWARD E. BRADFORD, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILIARLY SITUATED

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF JEROME N. FRANK LEGAL SERVICES ORGANIZATION AND THE FEDERAL PLAINTIFF CLASS IN *CHILDS* v. *UNITED STATES BOARD OF PAROLE*, 511 F.2d 1270 (D.C. CIR. 1974) AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

The Jerome N. Frank Legal Services Organization (LSO) is the clinical legal education program of the Yale Law School. LSO coordinates student legal assistance programs for individuals who cannot obtain quality legal services, including mental patients at

Connecticut Valley Hospital and prisoners at Connecticut Correctional Institution for Women and Danbury Federal Correctional Institution. In LSO's Danbury Project, from 15 to 40 students, under the supervision of practicing attorneys who are members of the law school clinical faculty, provide legal assistance to many of Danbury's 800 inmates. Since its founding in 1970, LSO's Danbury Project has counselled nearly 1600 federal prisoners, making it one of the most extensive and experienced programs of legal assistance to federal prisoners in the country. Hundreds of these cases have involved the federal and state parole systems.

In connection with parole matters, students and supervising attorneys have represented inmates before examiner panels of the United States Board of Parole, assisted in the drafting of administrative appeals from adverse decisions, sought out and presented to the Board information to improve the accuracy of parole files, and appeared before the Board sitting *en banc* in "original jurisdiction" cases. Occasionally, students and supervising attorneys have initiated litigation to establish and enforce the statutory and constitutional rights of their clients in the parole process.[1] LSO has also appeared *amicus*

[1] *See, e.g., Williams* v. *U.S. Board of Parole*, 383 F. Supp. 402 (D. Conn. 1974); *Grasso* v. *Norton*, 376 F. Supp. 116 (D. Conn. 1974), *aff'd in part, modified in part*, No. 74-1222 (2d Cir., June 23, 1975); *Battle* v. *Norton*, 365 F. Supp. 925 (D. Conn. 1973).

curiae in the United States Court of Appeals for the Second Circuit in a case turning upon practices of the United States Board of Parole.[2]

In conjunction with the Daniel and Florence Guggenheim Foundation, LSO has also sponsored two major academic projects concerning the parole system. First, during 1974-75 Yale Law School offered a Parole and Sentencing Workshop. Selected students with relevant clinical experience met monthly with faculty specialists and visiting officials of the Department of Justice, the Office of Probation of the Administrative Office of United States Courts, the United States Board of Parole (including its Chairman and Research Director), the Bureau of Prisons (a staff attorney and a warden), an ex-offender and two federal district judges. The Workshop produced several reports and studies focusing upon the recently revised federal parole procedures and the sentencing and parole provisions of the proposed revision of the Federal Criminal Code.

The other academic project was the first major empirical and theoretical study of the recently reformed federal parole procedures and "guidelines" and the impact of these reforms on judges and the federal sentencing scheme.[3] The importance of these

[2] *United States* v. *Slutsky*, 514 F.2d 1222, 1226-30 (2d Cir. 1975).

[3] Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L.J. 810 (1975).

reforms to the decision of this case is confirmed by the brief *amicus curiae* of the United States. Along with the casework experience outlined above, these academic programs of LSO inform this brief.

The Federal Plaintiff Class in *Childs* v. *United States Board of Parole*, 511 F.2d 1270 (D.C. Cir. 1974), is comprised of some 90 named federal prisoners representing all federal prisoners eligible for parole consideration under the terms of 18 U.S.C. § 4203.[4] See *id.*, at 1272, 1275; *see also Childs* v. *United States Board of Parole*, 371 F. Supp. 1246 (D.D.C. 1973). The *Childs* litigation commenced in May, 1970, with the filing of a *pro se* complaint challenging the parole release procedures of the United States Board of Parole as contrary to the Due Process Clause of the United States Constitution. The District Court appointed counsel from the undersigned firm of Williams, Connolly & Califano. Over a three-year period, evidentiary hearings were held, and numerous motions and memoranda were filed. In its final Memorandum and Order of October 17, 1973, the District Court made nine separate, detailed findings of fact relating to the absence of and the need for meaningful, written statements of reasons; the *de minimis* administrative burden on the Board in requiring written reasons; the substantial danger of Board decisions being based upon clearly erroneous assumptions of fact under Board practices and procedures; and the resultant need for a federal inmate or his representative to become apprised of the information upon which the Board will pass in rendering a decision. Based upon these findings, the Court concluded and ordered in pertinent part that:

> "1. Defendant must provide narrative written statements of reasons based upon salient facts or factors in each case to all prisoners whose applications for parole are acted upon and not granted. . . .
>
> "2. Defendants are to submit to the court . . . proposed regulations governing access by a prisoner to the information which will be before the Board and the submission of responses on behalf of parole applicants, and
>
> "3. Defendants are to submit to the court . . . proposed procedures for conveying to prisoners reasonably comprehensive explanatory guidance as to the criteria to be considered in passing upon applications for parole." 371 F. Supp., at 1247-48.

The Court of Appeals did not disturb the District Court's ruling on the appropriateness of a class ac-

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[4] 18 U.S.C. § 4203 sets forth the general standard for parole release. It reads in pertinent part:

> "(a) If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole."

tion. On the merits, the Court of Appeals affirmed Paragraph 1 of the above-quoted Order requiring reasons. It vacated and remanded Paragraph 2 for further consideration in light of developments subsequent to the entry of the District Court's order, including the Board's new procedures and guideline system.[5] Despite the potential impact of the *Childs* decision upon the Board of Parole, the Solicitor General did not petition for a writ of *certiorari*.[6] Further proceedings are being conducted in the District Court on remand. The District Court's original decision in *Childs* was relied upon by the Court of Appeals in the instant case in holding "that the due process clause has application to parole eligibility proceedings." (Pet. App. 15).

The Court's decision in this case will affect not only prospective parolees in North Carolina, but also federal prisoners, as recognized by the Solicitor General in his decision to file a brief *amicus curiae* in this case.[7] The purpose of this *amicus curiae* brief

[5] The Board did not appeal Paragraph 3 of the Order because shortly after the District Court's decision, the Board promulgated and began implementing new guidelines on a regional basis. *See Childs* v. *United States Board of Parole, supra,* 511 F.2d, at 1272.

[6] By Order of the Chief Justice on March 12, 1975, the Solicitor General was granted an extension of time to file his petition, but the petition was never filed.

[7] Because of the potential impact of its position on the Court of Appeals' *Childs* holding (that due process guarantees are applicable to the parole application process), the Department of Justice informed counsel for the *Childs* plaintiffs of the Department's contemplated filing of its *amicus* brief herein. *See also* Brief for the United States as *Amicus Curiae,* at 24-25, n. 8, discussing and differing with the *Childs* Court of Appeals' decision.

is to present the facts and legal principles necessary to this Court's understanding of parole due process in the federal context, based in part on experience of the *amici* in representing federal prisoners in the parole system.

Both parties have consented to the filing of this brief.

ARGUMENT

I

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED AND THE CASE REMANDED FOR DEVELOPMENT OF A RECORD ON THE NORTH CAROLINA PAROLE SYSTEM.

Petitioners have chosen to bring this case to this Court on a record consisting only of a *pro se* complaint and a motion to dismiss. The allegations in the complaint must therefore be treated as true for purposes of deciding whether the complaint states a claim. *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 515-16 (1972); *cf. Morrissey* v. *Brewer,* 408 U.S. 471, 476-77 (1972). These limitations notwithstanding, North Carolina and the United States impermissibly contradict the complaint throughout their briefs. They claim, for example, that inmates are supplied written reasons

for denial of parole. Respondents' claim asserts that no reasons were provided for denial. Appendix, at 5. Furthermore, the Solicitor General and the State have asserted that North Carolina has a set of orderly practices governing parole consideration. Neither the record nor any published material outside the record, however, furnishes any support for these bald assertions. "We must therefore treat this case in the posture and on the record [petitioners] elected to rely on in the District Court and the Court of Appeals." *Morrissey* v. *Brewer*, *supra*, 408 U.S., at 477.

An affirmance of the Fourth Circuit's remand for an evidentiary hearing is appropriate in view of the delicate and particular character of the institutions involved. As this Court so carefully noted in *Wolff* v. *McDonnell*, 418 U.S. 539, 568-69, 571-72 (1974), the requirements and practices of penal institutions vary widely. What due process may be required in one institution—or in one parole system—may not be required in another. This Court cannot finally determine what specific types of protections would be required in North Carolina without knowing sufficient facts to be able to assess the interests of the individual prisoners and those of the parole board and the public. Moreover, in addressing the preliminary question of whether due process protects inmates in the parole release decision itself, the Court should have access to detailed information indicating whether, as alleged in the complaint, inaccurate information was relied upon, whether impermissible bias accounted for parole decisions, whether the Commissioners implement systematic policies in making their release decisions, the importance of parole release as compared with other forms of release from prison in North Carolina, and a variety of other basic facts which can now only be asserted without evidence.[8]

The absence of any factual findings in the record on these vital questions precludes reaching the issue of the nature and extent of procedural practices required at parole release hearings. *Cf. Williams* v. *Zuckert*, 371 U.S. 531, 532 (1963); *Needleman* v. *United States*, 362 U.S. 600 (1960); *McCarthy* v. *Bruner*, 323 U.S. 673 (1944). Because "the record is not sufficiently clear and specific to permit decision of [these] important constitutional questions," *Massachusetts* v. *Painten*, 389 U.S. 560, 561 (1968), the Court should focus exclusively on the only issue decided by the Court of Appeals: whether inmates eligible for parole have a sufficient liberty interest to trigger the protections of the Due Process Clause.[9]

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[8] Extensive evidence as to these and other considerations was before the District Court in *Childs* v. *United States Board of Parole*, *supra*. Likewise, the District Court in *Wolff* v. *McDonnell*, *supra*, held an evidentiary hearing where witnesses, including the warden, testified. 418 U.S., at 543, 563-64.

[9] Petitioners raised only two issues as "Questions Presented" in their petition for a writ of *certiorari*. In addition to a procedural and jurisdictional question involving the applicability of *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), the sole other

Constitutional adjudication affecting the lives of thousands of prison inmates should not be grounded on speculation and conjecture or based upon the rhetorical flourishes of appellate advocates. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 420 (1974) (considerations urged by New Jersey's counsel in parole case proved irrelevant in practice to State parole board). Nor should such delicate questions be explored in a non-factual vacuum. The remainder of this brief shows that generally available secondary source information supports the Court of Appeals' conclusions that the Due Process Clause guarantees procedural fairness in parole release decisionmaking. Only a re-

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question was "WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS APPLICABLE TO THE PROCEDURES FOLLOWED BY A PAROLE COMMISSION IN CONSIDERING AN INMATE FOR PAROLE." Petition, at 2. Petitioners never raised the separate question of, assuming the Due Process Clause is generally applicable to parole release decisionmaking, the nature and extent of those procedures required by the Fourteenth Amendment. Rule 23(1)(c) of the Supreme Court Rules provides that "only the questions set forth in the petition or fairly comprised therein will be considered by the Court." While Rule 15(1)(c) indicates that "the statement of a question presented will be deemed to include every subsidiary question fairly comprised therein . . .", it is essential that any supposed subsidiary question arise in the record. *Tyrrell* v. *District of Columbia*, 243 U.S. 1 (1917). Moreover, this question was not reached by the Court of Appeals. *See generally* R. Stern & E. Gressman, *Supreme Court Practice* § 6.37, at 297-98 (4th ed. 1969). It is inappropriate for petitioners to add to the substance of the Question Presented in their petition for a writ of *certiorari*. *See id.*, § 13.8, at 466-68.

mand for full hearing, however, "can assure development of the actual facts, not just the pleaded contentions of the parties." *Ridley* v. *McCall*, 496 F.2d 213, 214 (5th Cir. 1974).

II

THE DUE PROCESS CLAUSE APPLIES TO THE PAROLE RELEASE DECISION.

Prisoners have an interest in their eventual release on parole that comes within the constitutional protection of "liberty." Release on parole is no "mere anticipation or hope of freedom", *Morrissey* v. *Brewer*, *supra*, 408 U.S., at 482 n.8, quoting *United States ex rel. Bey* v. *Connecticut Board of Parole*, 443 F.2d 1079, 1086 (2d Cir.), *vacated as moot*, 404 U.S. 879 (1971).[10] Rather, it is a fundamental and integral part of the correctional system, of enormous value to both the inmate and the state. The discretionary nature of the decision to release, like the discretionary decision whether to revoke, affects liberty in a sufficiently important way to invoke appropriate procedural protections. Indeed, the interest at stake in the parole release hearing is not constitutionally distinguishable from the valuable liberty this Court sought to protect in *Morrissey*. As Judge

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[10] *Bey* relied exclusively on *Menechino* v. *Oswald*, 430 F.2d 403 (2d Cir. 1970), for this characterization, a dictum now expressly rejected in *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, 500 F.2d 925, 927-28 & n.2 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974).

Fahy observed in *Childs* v. *United States Board of Parole, supra*, 511 F.2d, at 1278:

> "The deprivations due to revocation of the conditional liberty enjoyed by a parolee demonstrate the serious effects of denial of parole. The applicant is deprived of the valuable features of conditional liberty described by the Court. This seems to us to place the procedures by which this deprivation is accomplished by the government under a standard of due process. The Board holds the key to the lock of the prison. It possesses the power to grant or to deny conditional liberty. In the exercise of its broad discretion it makes judgments concerning the readiness of an inmate to conduct himself in a manner compatible with the well-being of the community and himself. If the Board's decision is negative, the prisoner is deprived of conditional liberty. The result of the Board's exercise of its discretion is that an applicant either suffers a 'grievous loss' or gains a conditional liberty. His interest accordingly is substantial. We think it follows that the parole decision must be guided by minimal standards of due process of law which at the same time reflect the need of the parole system to function consistently with its purposes and responsibilities."

A. Far More Than A Unilateral Hope Of Prisoners, Parole Is A Fundamental, Necessary Component Of The Correctional System.

This Court and others have recognized that the parole release decision is one of the most significant

parts of an entire process or system which our political and social institutions have evolved dealing with convicted persons. *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). For a variety of reasons, parole has come to be essential to the administration of post-conviction justice. The widespread, systematic reliance on parole release which has followed this development means that for most prisoners, in most states, the parole release decision is at least as important as the sentencing decision in determining how long they will be incarcerated. As the Attica Report attests, "[i]n practice, the Parole Board—not the judge—decides how long an inmate will serve time." *The Official Report of The New York State Special Commission on Attica* 93 (Bantam Books ed. 1972). *See also* S. Rep. No. 94-369, 94th Cong., 1st Sess. 15-16 (1975) ("Parole is an extension of the sentencing process. . . . The final determination of how much time an offender must serve is made by the parole authority.") The interest prisoners bring to the parole decision, therefore, is no "unilateral expectation" or "hope." In the parole decision, as in sentencing, while the person duly convicted of a criminal offense no longer has an unqualified right to liberty, he nonetheless retains a constitutional interest in freedom that requires minimal standards of fair treatment. *See, e.g., United States* v. *Tucker*, 404 U.S. 443 (1972); *Mempa* v. *Rhay*, 389 U.S. 128 (1967); *Townsend* v. *Burke*, 334 U.S.

736 (1948).[11] As the Court of Appeals noted in *Childs* v. *United States Board of Parole*, *supra*, 511 F.2d, at 1280:

> "Just as the Court found in *Wolff* [v. *McDonnell*, *supra*, 418 U.S., at 557] that the State, having created the valuable right to good time, must act according to constitutional safeguards when it withdraws the right, so here, where the federal government has made parole an integral part of the penological system, . . . it is also essential that authority to deny parole not be arbitrarily exercised."

Pre-expiration release has, in effect, been institutionalized in this country. Parole cannot be characterized as simply an alternative to pardon, reserved for those few prisoners who may be said to be rehabilitated in prison.[12] Rather, in most states

[11] As the Second Circuit found in *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, 500 F.2d 925, 928, (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974) (emphasis added):

> "[T]he average prisoner, having a better than 50% chance of being granted parole before the expiration of his maximum sentence, has a *substantial 'interest'* in the outcome. For him, with such a large stake, the Board's determination represents one of the most critical decisions that can affect his life and liberty."

[12] As the South Carolina Department of Corrections has forthrightly acknowledged:

> "Where parole is the common, almost universal, method of release from prison it comes to be viewed more often as a right—indeed it is the norm—than where it is granted reluctantly and rarely, and in jurisdictions with long statutory sentences, infrequent use of pardon, and no other alternative to sentence mitigation, parole becomes crucially important to inmates . . . ." South Carolina Department of Corrections, *The Emerging Rights of the Confined* 198 (1972).

and in the federal system, parole and the good-time laws work hand in hand to keep prison populations down to acceptable levels, to mitigate the harshness of sentences, to minimize unwarranted disparities between persons receiving prison sentences and those placed on probation, and finally, to control prison behavior by offering incentives to discipline and participation in rehabilitative and vocational programs.[13] A system which depended merely on the unfulfilled, unilateral expectations of its subjects could not succeed in these functions. Rather, parole is regarded by inmates, prison administrators and parole officials as a pervasive fact of prison life, a carrot to be waved by rehabilitative staff, a stick to be wielded by guards and other correctional personnel to ensure good behavior.[14] In this light, it more properly must be regarded as a system of mutual expectations which

[13] *See* Kastenmeier & Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 Am. U.L. Rev. 477 (1973); Comment, *The Parole System*, 120 U. Pa. L. Rev. 282 (1971).

[14] *See* Hearings Before Subcomm. No. 3 of House Comm. on Judiciary, 92d Cong., 2d Sess., Ser. 15, pt. 7-A, at 483, 493-94 (1972). In the federal system, an inmate who has forfeited satisfactory good time for disciplinary infractions cannot be granted parole. 28 C.F.R. § 2.29 (1975), *as amended*, 40 Fed. Reg. 41328-42 (Sept. 5, 1975).

in some jurisdictions have been formally set down in statutes, rules or regulations, and in others, remains informal. In either system, however, definite and mutual expectations arise that most inmates will be released on parole at some time prior to the expiration of their maximum terms.

Parole is the usual form of release from incarceration, particularly for inmates with sentences over two years.[15] Furthermore, sentencing judges assume in setting maximum terms that inmates will be released earlier, and many have been known to tell the defendant that "you have the key to prison in your pocket."[16] The recent Survey of Sentencing Judges conducted by the Yale Law Journal is particularly illuminating on this point, since at the time the survey was conducted, the revised federal parole decisionmaking system had not yet been fully effectuated and was not generally known or understood by the judges responding to the Survey. Their

[15] In North Carolina, secondary data indicate that 62.4% of each year's releases are on parole. M. Hindelang, et al., *Sourcebook of Criminal Justice Statistics 1973* (U.S.L.E.A.A.), at 359. This figure is near the national average rate. *See* U.S. President's Comm'n on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 70 (1967). Indeed, in 1967 some 30 percent of the total state and federal prison population were released on parole. U.S. Bureau of the Census, *Statistical Abstract of the United States* 157 (1970).

[16] *See* Newman, *Foreword* to Project, 84 Yale L.J. 810, 812-13 (1975); *id.*, at 882 n.361, 890 nn.386-88; *see also Childs* v. *United States Board of Parole, supra,* 511 F.2d, at 1278; *cf. United States* v. *Slutsky,* 514 F.2d 1222, 1229 (2d Cir. 1975).

responses are thus even more indicative of the attitudes of the judiciary in jurisdictions still operating under a more traditional parole system such as North Carolina appears to operate. Two-thirds of these experienced federal judges reported that they expected the defendants they sentenced to be released before serving the full term imposed. And nearly half expected release to come immediately upon eligibility. Project, *supra,* note 3, 84 Yale L.J., at 882-83 n.361. The prisoner's interest in parole is hardly a unilateral expectation.

B. A Parole Board's Broad Grant Of Discretionary Authority Hardly Precludes The Application Of Due Process.

The haphazard state of parole decisionmaking has prompted many of the reform efforts—judicial, legislative and administrative—discussed in the brief of the United States. The failure to provide reasons or to afford a reasonable opportunity for the inmate to contribute information and to respond to adverse evidence is at odds with fundamental notions of the way governmental agencies should operate to their own best advantage and to comply with minimal requirements of fairness. *See Wolff* v. *McDonnell, supra,* 418 U.S., at 555-58; K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* 126-133 (1969). In *Morrissey,* this Court emphatically rejected the notion that a parole board's discretionary authority is inhibited, much less thwarted, by minimum standards of procedural fairness.

> "Nor are we persuaded by the argument that revocation is so totally a discretionary matter that some form of hearing would be administratively intolerable. A simple factual hearing will not interfere with the exercise of discretion. Serious studies have suggested that fair treatment on parole revocation will not result in fewer grants of parole." 408 U.S., at 483 (footnote omitted).

In countless other areas of public life, administrative agencies empowered to make discretionary judgments are required by law to follow procedures designed to assure that, whatever the decision may be, it has been arrived at fairly and as accurately as possible. Such rules are no less incompatible with parole release decisionmaking than they are with those made by federal agencies which go beyond minimal requirements and seek to attain the maximum in fairness and correctness of decisionmaking.

This was clearly the judgment of the House Judiciary Committee in reporting favorably, and the full House of Representatives in passing by a vote of 260 to 137, the Parole Reorganization Act of 1975 (H.R. 5727), which

> "provides an infusion of due process into Federal parole procedures. The parole system has long been recognized as the single most unequitable, potentially capricious, and uniquely arbitrary corner of the criminal justice map. Sixth Amendment criminal prosecution protections that have been gained through the courts have

> been hard fought and remain inadequate." H.R. Rep. No. 94-184, 94th Cong., 1st Sess. 2 (1975).[17]

The fact that a particular parole decision is not *dictated* by any given set of facts does not, as the *amicus* brief of the United States would have it, extinguish the prisoner's right and need to have evaluations made fairly and, to the extent facts are relevant, accurately.

C. The Prospective Parolee's Interest In Liberty Is Constitutionally Indistinguishable From That Of A Parolee Facing Revocation.

The basic thrust of the Solicitor General's argument—that persons inside prisons do not share the same interest in parole release with those already on parole—must be seen as fundamentally mistaken. Certainly, the interest is not precisely the same.

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[17] On September 11, 1975, the Senate Judiciary Committee reported favorably an amended version of H.R. 5727, entitled the Parole Commission Act. In its Report accompanying the bill, the Senate Judiciary Committee noted:

> "Parole is perhaps the most important item in the mind of every prisoner because it is his key to the door. It is essential, then, that parole has both the fact and appearance of fairness to all. Nothing less is necessary for the maintenance of the integrity of our criminal justice institutions. The openness and sense of fairness that is intended in the provisions of this legislation will have the beneficial effect of allowing the participants in parole —the inmates—to understand their place in the system and to better appreciate what is expected of them." S. Rep. No. 94-369, 94th Cong., 1st Sess. 19 (1975).

A factual difference exists between the present enjoyment of conditional freedom and a present interest in the likelihood of conditional freedom. The nature of the interest, however, is identical. As the Second Circuit has recognized, "the stakes are the same: conditional freedom versus incarceration." *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra*, 500 F.2d, at 928. While the degree of hardship imposed by the denial of parole and the revocation of parole may differ, and may justify differences in the degree of procedural protection accorded, the Court has already decided in *Morrissey* that a person's interest in conditional freedom is at the heart of the liberty protected by the due process guarantee.

> "By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal." 408 U.S., at 482.

Indeed, this case follows *a fortiori* from *Wolff* v. *McDonnell, supra*. If the prisoner's interest in the threatened delay of a tentative future release date is protected, so must be the prospect of definite conditional freedom. Given the high level of mutual expectation and the significance of "making parole" to a prisoner's degree of freedom, the Due Process Clause certainly should apply.

III

DETERMINATION OF THE APPROPRIATE MINIMUM PROTECTIONS REQUIRES AN ASSESSMENT OF THE INTERESTS AT STAKE IN THE PAROLE RELEASE DECISION.

The determination of what process is due in the parole release decision must be based on careful consideration of the interests of the state, the prisoner and the general public. The interest of these various groups can be assessed and weighed by meticulously examining and scrutinizing the parole process in general, with particular focus on the release aspect. The strengths and shortcomings of recent changes in the federal parole process may help point to the appropriate balance.

A. The Interests At Stake.

The state, of course, has an interest in the efficient administration of the parole system. The state also has an interest in insuring the integrity and appearance of integrity of the parole process. This interest is dictated by the unique and well-established role of parole release in the criminal justice system and rehabilitative process. It requires that parole release decisions must not be arbitrary and that they be based on all available accurate data. *See, e.g., United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra*, 500 F.2d, at 932-33. " 'One can imagine nothing more cruel, inhuman and frustrating than serving a prison term without

knowledge of what will be measured and the rules determining whether one is ready for release.'" K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* 132 (1969), quoting Porter, *Criteria for Parole Selection*, in Proceedings of American Correctional Association, at 227 (1958).

This concern is shared by society in general since it, too, has an obvious and real interest in the integrity and success of the rehabilitative process. To fulfill its promise to society, parole must not frustrate or embitter prisoners by subjecting them to what are, or appear to be, arbitrary or irrational decisions based on caprice or inaccurate information.[18] Nearly all prison inmates face a parole release decision at some point during their term of incarceration. Moreover, as we have previously shown, parole is the most common form of release. The importance of parole's impact on the rehabilitative process, recognized by this Court in the revocation context in *Morrissey*,[19] is heightened in the parole release de-

[18] The Attica Commission found that "[f]ar from instilling confidence in the Parole Board's sense of justice, the existing procedure merely confirms to inmates, including those receiving favorable decisions, that the system is indeed capricious and demeaning." *Official Report of The New York State Special Commission on Attica* 98 (Bantam Books ed. 1972); *see also, id.*, at 97. Two of the "Fifteen Practical Proposals" put forward by the Attica inmates related directly to parole. *See* T. Wicker, *A Time To Die* 317 (1975).

[19] "The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions. See *People ex rel. Menechino* v. *Warden*, 27 N.Y. 2d 376, 379, and n. 2, 267 N.E. 2d 238, 239, and n. 2 (1971) (parole board had less than full picture of facts). And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." 408 U.S., at 484.

cision setting. The greater number and greater public awareness of parole release decisions, as compared with revocations, makes their fairness all the more crucial.

These considerations flowing from the state's and society's interests in ensuring the integrity of the parole process are consistent with the prisoner's interest in "liberty" through conditional freedom from incarceration. He, too, has an interest in the release decision being made on the basis of accurate data. He, too, has an interest in having all such available data before the decisionmaker. And perhaps most importantly, he, too, has an interest in being free from arbitrary decisions or decisions cloaked in secrecy and influenced by irrational, inconsistent or impermissible criteria. *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra*, 500 F.2d, at 929. In the absence of any indication of how decisions are made or what they are based on, prisoners are left to counterproductive speculation and are deprived of an important incen-

tive and guide to future conduct. *See Morrissey* v. *Brewer, supra,* 408 U.S., at 484; *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra,* 500 F.2d, at 932-33.

B. Strengths and Weaknesses Of Recent Changes in the Federal Parole System.

The interests at stake in the parole release decision, as this Court has recognized, are exceedingly difficult to balance appropriately. The experience of the United States Board of Parole in recent years illuminates some of the concrete factors that must be considered in this attempt.

The United States Board of Parole, under escalating criticism from scholarly, professional and lay critics and under increasingly stringent scrutiny by the federal courts, undertook in the early 1970's its own review of its policies and decisionmaking processes. The system which evolved through this effort apparently represents the Board's attempt to systematize those factors and policies which were actually in effect in their earlier years of seemingly policy-less decisionmaking. Therefore, although the Board's "guideline" system for decisionmaking may appear to be radically different from the more informal systems prevalent in most state systems, in effect the guidelines have merely articulated and made more easy to implement the basic concerns of deterrence, punishment, rehabilitation and incapacitation which have always been at the root of parole

release decisionmaking. *See generally* Project, *supra* note 3, 84 Yale L.J., at 820-33.

Under the guideline system, an inmate's parole release date will generally be determined by two ratings. *See* 28 C.F.R. §§ 2.1-2.58 (1975), *as amended,* 40 Fed. Reg. 41328-42 (Sept. 5, 1975). The first rating ("salient factor score"), based primarly on past criminal record and personal history, reflects the likelihood that the inmate will be a recidivist, *i.e.,* that he will fail to abide by the law upon release. The second rating ("offense severity") reflects the Parole Board's view of the relative severity of the offense committed. An inmate's expected release time is based on the average amount of time served before release by past groups of inmates having similar salient factor scores and offense severity ratings.

In addition to the objective guidelines for decisionmaking, the Board adopted a series of procedural changes [20], many of which have been urged here by

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[20] After initial opposition to congressional intervention, the Parole Board established a working relationship with the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice in the summer of 1972 and adopted administratively many of the Subcommittee's recommendations for procedural reform. *See* H.R. Rep. No. 94-184, 94th Cong., 1st Sess. 2 (1975). Still other significant changes were made by the Board only as a result of persistent litigation. *See, e.g., Childs* v. *United States Board of Parole, supra.* In fact, the latest amendments to the Board's regulations in 40 Fed. Reg. 41328-42 (Sept. 5, 1975)—calling for improved fact-finding procedures, increased disclosure to parole appli-

the respondents. Inmates are now given hearings, which they may attend with a "representative", who may give a supporting statement but only at the conclusion of the hearing. 28 C.F.R. §§ 2.12, 2.13, *as amended.* The inmate is also permitted to make a statement, and both inmate and representative may respond to questions. *Ibid.* The inmate is immediately informed orally of the decision made by a panel of two hearing examiners and is normally to be notified in writing of the decision and underlying reasons within 15 working days of the hearing. *Id.*, § 2.13(d).

The guidelines have improved the task of parole release decisionmaking by "structuring" the discretion accorded the Parole Board. In any case in which the hearing examiners believe that the time indicated by the guidelines is too short, or too long, they may recommend a decision "outside" of the guidelines. 28 C.F.R. § 2.20(c),(d), *as amended.* The examiner's recommendation is supported by a reason and is reviewed by the Regional Director, who is a member of the Board of Parole. Approximately 80% of first parole decisions are within the

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cants of their files and records, and in-person hearings for inmates sentenced under 18 U.S.C. § 4208(a)(2) upon completion of one-third of their sentence—were likely required or influenced by recent litigation. *See, e.g., Garafola* v. *Benson,* 505 F.2d 1212 (7th Cir. 1974); *Childs* v. *United States Board of Parole, supra.*

guidelines, with some 20% falling outside the guidelines.[21]

The Board's experience to date under these procedures substantially undercuts the United States' suggestion that a decision by this Court affirming the Court of Appeals would adversely "affect the constitutional context in which the federal parole system operates." Brief for the United States as *Amicus Curiae,* at 2. *See* Sigler, "Abolish Parole?", 39 Fed. Probation, June 1975, at 42; Project, *supra,* note 3. The same argument advanced by the United States could be made against the substantive and procedural reforms that would be required by the Parole Reorganization Act of 1975 and Parole Commission Act (H.R. 5727). See pages 18-19, *supra.* It can hardly be doubted, however, that Congress possesses the power to enact legislation guaranteeing "an infusion of due process into Federal parole procedures." H.R. Rep. No. 94-184, 94th Cong., 1st Sess. 2 (1975).[22] *Cf. Katzenbach* v. *Morgan,* 384 U.S. 641 (1966).

Even though the Parole Board has taken some steps along the road to a fairer and more effective

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[21] Project, *supra* note 3, 84 Yale L.J. at 869 n. 293 (1975).

[22] In passing its amended version of H.R. 5727, the Senate Judiciary Committee recognized that:

> "The denial of parole is in a limited sense the taking of an individual's liberty, or at least the opportunity for him to obtain liberty. *The Constitution requires due process of law . . . .*" S. Rep. No. 94-369, 94th Cong., 1st Sess. 19 (1975) (emphasis added).

parole system, the Yale Law Journal study revealed substantial need for improvements. Commonly, the hearings were not used to verify information considered by the panel to be significant.[23] On those oc-

[23] Some of the most recent changes instituted by the Board should help decrease this problem, but substantial improvements must still be made in the accuracy of information relied upon by the Parole Board. As researchers for the United States Board of Parole have complained:

> "Unfortunately, the files are not uniformly complete and frequently include obviously conflicting information [such as vocational or educational programming and drug use].
>
> "In one file, an inmate was listed as an illiterate who spoke only Spanish at admission. A later report listed the inmate as having completed 40 hours of college credit . . . .
>
> "Instances of misfiling are frequent. Often a report will indicate that the same subject is a white male, while the picture in that same file shows what appears clearly to be a black (or vice versa). Presentence reports are often found inaccurately filed . . . .
>
> "Numerous examples of discrepancies in the files could be cited [such as birth dates and date of first arrest]. . . .
>
> "The inmate's arrest record is an important source [of information]. In many cases no specific information is given about the number of prior arrests, convictions, dates, fines, or time actually served. The Federal Bureau of Investigation arrest records which appear in many of the files are very difficult to use, since the same arrest and conviction may be entered six or seven times at each stage of arrest, transfer, conviction, and incarceration; and dispositions often are not shown.
>
> ". . . [This] lack of uniformity, clarity, and concern for the accuracy of information [in prison files] sets obvious limits upon the quality of information which may be reliably extracted from the files . . . ." S. Singer & D. Gottfredson, *Development of a Data Base for Parole Decision-Making* 2-5 (NCCD Research Center, Supp. Report No. 1, 1973).

casions when discussion did ensue, material errors were often revealed. An error in the files may, on the one hand, lead to a longer period of incarceration at government expense than is warranted, or on the other hand, may result in the premature release of an inmate whom the Board would wish incarcerated for a longer period in order to protect the public. An adequate opportunity to verify significant information is therefore crucial to the interests of both inmate and society.

> "There is no reason why an inmate should have to wait for an error to be corrected through the administrative process, or eventually by the courts, when the likelihood of error is fostered by the absence of safeguards and lack of fairness in the original determination." Project, *supra* note 3, 84 Yale L.J., at 862.

In short, while only a full evidentiary hearing can develop the facts necessary to identify and balance the interests at stake in the North Carolina parole system, the recent experiments and developments in the federal parole system show that significant improvements are not only possible, but practical as well. Constitutionally based minimum standards can only foster such improvements.

CONCLUSION

Evidence available from observation, participation and secondary sources demonstrates that the Due Process Clause applies to parole release hearings and that minimum procedural protections designed to ensure accuracy, fairness and the appearance of integrity are essential. The extent of procedural protections necessary for fair and just parole release decisionmaking turns on factual issues not yet adjudicated. The Court of Appeals' decision to remand this case for hearing should thus be affirmed.

Respectfully submitted,

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